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SUPREME COURT, U.S.
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No. 99-1884

In The

Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

EDWARD R. COSS, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

EDWARD M. CHIKOFSKY
Counsel of Record
301 East 87th Street
New York, NY 10128
(212) 289-1062

DAVID M. PORTER
NACDL
1025 Conn. Ave. NW
Washington, DC 20036
(202) 872-8600

Counsel for Amicus Curiae

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QUESTION PRESENTED

Whether the custody requirement of the federal habeas corpus statute (28 U.S.C. §2241 *et seq.*) contemplates collateral attack, on constitutional grounds, upon fully-expired conviction used to enhance later conviction under present habeas review for which the prisoner is presently in custody.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Hohn v. United States*, 524 U.S. 236 (1998).[1]

SUMMARY OF ARGUMENT

1. *Maleng v. Cook* properly permits federal collateral attack on unconstitutional prior convictions used to enhance a prisoner's current incarceration. While federal courts may

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[1] All parties have consented to the appearance of NACDL as *amicus curiae* in this matter and letters of consent have been lodged with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

not entertain direct challenges to fully-expired convictions and sentences, *Maleng* nonetheless broadly construed the custody requirement such that expired convictions were still subject to collateral attack to the extent that they were being latterly used to enhance subsequent convictions and sentences the prisoner was presently serving. The lower federal courts are virtually unanimous in holding that a prisoner whose present sentence is enhanced by a prior unconstitutional conviction may still seek federal habeas corpus review to the extent that his present sentence was enhanced by the earlier unconstitutional conviction.

2. *Custis v. United States* does not preclude federal collateral attack on unconstitutional prior convictions used to enhance current incarceration, particularly where the earlier conviction is attacked for constitutional defects directly related to factual accuracy. *Custis* was a federal sentencing case which construed the recidivist provisions of the Armed Career Criminal Act. It had no occasion to consider the entirely separate realm of federal post-conviction review, which has entirely different institutional considerations from the efficient judicial administration of federal sentencing proceedings. More to the point are this Court's decisions in *Townsend v. Burke* and *United States v. Tucker*, holding that sentences imposed on the basis of misinformation of constitutional magnitude – such as constitutional defects that undermine the factual accuracy and reliability of earlier convictions – must be set aside on both Fifth and Sixth Amendment grounds.

3. AEDPA has no application to this case. Respondent's habeas petition was filed prior to the statute's effective date. In any event, nothing contained in the amended statute suggests that Congress intended to change the judicial interpretation of "custody" that this Court has carefully crafted over the last forty years.

ARGUMENT

THE COURT OF APPEALS CORRECTLY AWARDED FEDERAL HABEAS RELIEF TO A STATE PRISONER WHOSE SENTENCE WAS IMPROPERLY ENHANCED THROUGH THE USE OF AN UNCONSTITUTIONAL PRIOR CONVICTION

The court of appeals properly determined that Edward Coss' most recent state conviction, imposed in 1990, was improperly enhanced through the sentencing judge's reliance upon an earlier 1986 state conviction, which the court of appeals determined was unconstitutional as it was secured as the result of ineffective assistance of counsel at Coss' 1986 trial. Accordingly, the court of appeals properly vacated the earlier conviction. 204 F.3d 453 (3d Cir. 2000).

Contrary to the state's assertions (or those of its *amici*), Coss was deemed properly "in custody" pursuant to the federal habeas corpus statutes (28 U.S.C. §§2241 *et seq.*) because he was attacking the improper use of his earlier 1986 state conviction to enhance the 1990 sentence he was presently serving, notwithstanding the earlier expiration of the custodial portion of the 1986 sentence.

Neither *Maleng v. Cook*, 490 U.S. 488 (1989) nor *Custis v. United States*, 511 U.S. 485 (1994) vitiate the authority of the federal courts to entertain habeas corpus petitions attacking a state prisoner's present incarceration where he seeks to attack the constitutionality of an earlier conviction which is used to enhance the current sentence he is presently serving. Nor have the recent Congressional amendments to the federal habeas corpus statutes altered in any respect the definition of "custody" which this Court has carefully crafted over the last forty years.

A. *Maleng* Properly Permits Federal Collateral Attack On Prior Convictions Used To Enhance Current Incarceration

In *Maleng v. Cook*, this Court broadly construed the "in custody" requirement for federal habeas corpus where a prisoner's present sentence was enhanced by a prior unconstitutional conviction. It found custody whenever "petitioner suffers [some] present restraint from a conviction." 490 U.S. at 492. While it held that federal courts no longer have jurisdiction to entertain petitions directly attacking fully-expired convictions and sentences, even when they are used to enhance subsequent sentences (*id.* at 492), *Maleng* nonetheless "left open the possibility ... that the conviction underlying the expired sentence might [still] be subject to challenge in a collateral attack upon the subsequent sentence that the expired sentence was used to enhance." *Garlotte v. Fordice*, 515 U.S. 39, 45 n.4 (1995)(*citing Maleng*, 490 U.S. at 494). *See also Custis v. United States*, 511 U.S. at 512 & n.7 (Souter, J., joined by Blackmun & Stevens, JJ., dissenting)(majority opinion "does not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent that it was lengthened by a prior unconstitutional conviction.")

This has been the near universal holding of the courts of appeals as well. *See, e.g., United States v. Clark*, 203 F.3d 358, 364 (5th Cir. 2000)("Courts of Appeals have uniformly answered ... question [left open in *Maleng*] in the affirmative: as long as the habeas relief sought is framed as an attack on a present sentence, as to which the prisoner is still 'in custody', then the expired conviction used to enhance that sentence may be challenged" (collecting cases)). *See also Tredway v. Farley*, 35 F.3d 288, 292 (7th Cir. 1994)("Because a person currently serving a sentence that was enhanced on the basis of a prior conviction is still in custody, he may challenge the enhancing conviction as

constitutionally invalid even though the prior conviction's original custodial term has expired")(*quoting Smith v. Farley*, 25 F.3d 1363, 1365-66 (7th Cir. 1994).

In the present case, the court of appeals made a finding that the state trial judge sentencing Coss in his 1990 case specifically invoked the earlier 1986 conviction in passing sentence on the latter conviction. 204 F.3d at 460. That was enough, the court of appeals correctly held, to allow Coss to attack his earlier conviction in the context of his later (present) incarceration, invoking this Court's decision in *United States v. Tucker*, 404 U.S. 443 (1972), which held, under analogous circumstances, that a prisoner could attack an unconstitutional prior conviction, even if he had served the earlier sentence in its entirety, so long as that earlier conviction had an enhancing impact on the sentence he was presently serving. *Id.* at 460.

Neither the state nor its *amici* have presented any valid legal basis for challenging this Court's ruling in *Maleng* other than their usual discomfiture at allowing an inmate the use of a federal forum in which to challenge a state conviction. Indeed, contrary to *amici*'s assertions (St. *Amici* Br. 9-12), both the district court and the court of appeals quite properly construed Coss' federal petition as an attack on his 1990 conviction insofar as it was enhanced by the earlier 1986 conviction. 204 F.3d at 459-60. That characterization fit precisely the distinction drawn in *Maleng* between attacks on expired convictions, on the one hand, and an attack on a later conviction enhanced by an (otherwise) expired conviction. 489 U.S. at 493.

B. *Custis* Does Not Preclude Federal Collateral Attack On Prior Convictions Used To Enhance Current Incarceration Where The Earlier Conviction Is Attacked For Constitutional Defects Directly Related To Factual Accuracy

The state argues that *Custis* should be read to preclude all federal post-conviction attack on convictions later used to enhance subsequent sentences in state or federal court. *Custis* does no such thing. It is a federal sentencing case which leaves undisturbed existing federal post-conviction remedies.

In *Custis*, this Court construed a federal sentencing provision under the Armed Career Criminal Act (ACCA), in which it considered the availability during federal sentencing proceedings of collateral attacks on prior convictions that may serve as the basis for sentence enhancement under the ACCA. The Court held that Congress did not intend to permit defendants to challenge the validity of earlier convictions at federal sentencing hearings, except where the convictions were obtained in violation of the right to counsel, contrary to *Gideon v. Wainwright*, 372 U.S. 335 (1963), as well such cases as *United States v. Tucker, supra*, and *Burgett v. Texas*, 389 U.S. 109 (1967).

Whether *Custis* may properly be applied outside of the federal sentencing context so as to preclude all federal post-conviction review of enhanced sentences is another matter entirely. Indeed, Justice Ginsburg, who concurred in the *Custis* holding, has nevertheless stated that "*Custis* presented a forum question. The issue was where, not whether, the defendant could attack a prior conviction for constitutional infirmity." *Nichols v. United States*, 511 U.S. 738, 765 (1994)(Ginsburg, J., dissenting).

The overwhelming majority of courts of appeals that have considered the question have held that *Custis* does not – and should not – preclude a federal habeas challenge to the constitutional validity of a prior conviction – on other than *Gideon* grounds -- on which a later sentence enhancement was based. *See, e.g., United States v. Clark*, 203 F.3d 358, 365-70 (5th Cir. 2000)(and cases collected therein); *Brock v. Weston*, 31 F.3d 887, 890-91 ((9th Cir. 1994)(*Custis* does not

preclude §2254 challenge to fully served convictions used to enhance current state confinement). In *Young v. Vaughn*, 83 F.3d 72 (3d Cir. 1996), the Third Circuit put the matter thus (*id.* at 77): "[I]f a general principle is to be derived from *Custis*, it is the much narrower one that 'federal sentencing hearings are not the proper forum for addressing the validity of prior convictions.'"

In *United States v. Tucker*, this Court vacated a conviction on federal post-conviction review and remanded for resentencing because two of the convictions used to enhance the defendant's federal sentence had been obtained in violation of *Gideon*. 404 U.S. at 446-49.

More importantly, for present purposes, the Court also justified its decision by noting that the defendant's sentence was imposed "in part upon misinformation of constitutional magnitude." *Id.* at 447. The Court relied on *Townsend v. Burke*, 334 U.S. 736 (1949) for the proposition that a defendant may not be sentenced on the basis of inaccurate information. *See id.* at 740-41 (defendant "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue" and such a result was "inconsistent with due process of law"). *See also Zant v. Stephens*, 462 U.S. 862, 887 n.23 (1983)("[a]s we held in *United States v. Tucker* ... the sentence must be set aside if the trial court relied at least in part on 'misinformation of constitutional magnitude' such as prior uncounseled convictions that were unconstitutionally imposed").

Indeed, the courts of appeals have properly read *Townsend, Tucker* and their progeny to allow challenges based upon constitutional violations beyond facial *Gideon* violations, including – as in this case – ineffective assistance of counsel.

While the outright denial of a defendant's sixth amendment right to trial counsel is perhaps the clearest

example of a constitutional defect that undermines the factual reliability of the resulting verdict, ineffective assistance of counsel is a second example of a constitutional defect that calls defendant's factual guilt of the prior offense into question. *United States v. Cronic*, 466 U.S. 648, 653-57 (1984)(where a defendant has a right to counsel, he also has a right to have that counsel's performance be competent); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)("It has long been recognized that the right to counsel is the right to effective assistance of counsel"). This is because an ineffective attorney may fail to present relevant facts or raise relevant defenses that would exculpate the defendant. *Cronic*, 466 U.S. at 654-57. Indeed that is precisely what the court of appeals found had occurred in this very case. 204 F.3d at 462-64. *See especially United States v. Brown*, 610 F.2d 672, 674-75 (9th Cir.1980)(*Tucker* extended to ineffective assistance of counsel claims).

Clearly, prior convictions unconstitutional on grounds that affect the accurate ascertainment of factual guilt constitute "misinformation of constitutional magnitude" within the meaning of *Townsend* and *Tucker*. This is because such convictions are not reliable indicators of past criminality and hence may misrepresent the defendant's criminal history. *See Lewis v. United States v. United States*, 445 U.S. 55, 67 (1980)(explaining that the collateral use of an uncounseled conviction for sentence enhancement in *Tucker* "depended upon the reliability" of that conviction). Consequently, the due process clause forbids the use of such convictions for sentence enhancement. Moreover, given the *Tucker* Court's reasoning that use of a *Gideon*-violative prior conviction contravenes the sixth amendment, it follows that the enhancement use of a prior conviction invalid on grounds directly related to factual accuracy also contravenes the constitutional right infringed in the earlier prosecution, in this case, the Sixth Amendment right to effective assistance of counsel. 404 U.S. at 447.

Nor is the seeming revival of the decades-old jurisdictional defect theory suggested in *Custis* relevant here. *Compare* 511 U.S. at 496 *with id.*, at 508-09 (Souter, Blackmun & Stevens, JJ., dissenting). Whatever limitations this Court has determined that Congress has imposed in the interest of the efficient administration of federal sentencing schemes, they have no relevance in the entirely separate realm of federal post-conviction review, which has entirely different institutional considerations. *Custis*, accordingly, a federal sentencing case, in no respects limits the range of claims that may be pursued on federal habeas corpus review.

C. AEDPA Has No Application To This Case

Contrary to the state's assertions (Pet. Br. 10-14), the recently-enacted provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) have no application to this case. First, Coss' federal habeas petition was filed in the district court prior to AEDPA's effective date. Second, in any event, the new statute makes no change whatever in the otherwise judicially-crafted definition of "custody" as that term has come to be understood in such cases as *Maleng, Garlotte, Spencer v. Kemna*, 523 U.S. 1 (1998); *Carafas v. LaVallee*, 391 U.S. 234 (1968); and *Jones v. Cunningham*, 371 U.S. 236 (1963).

First, the court of appeals specifically held that Coss' original federal habeas petition and its first amendment were filed prior to AEDPA's effective date of April 24, 1996. 204 F.3d at 461. The second amended petition, filed at the district court's invitation in November 1996, added no new claims and merely deleted those claims in the first petition that the district court concluded were unexhausted. *Id.* Accordingly, both the district court and the court of appeals

properly construed Coss' federal petition as having raised its substantive claims prior to AEDPA's effective date. That finding is clearly correct under this Court's authorities. *See, e.g., Slack v. McDaniel*, 120 S.Ct. 1595, 1605 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); and *Lindh v. Murphy*, 521 U.S. 320 (1997).

Second, and equally important, Congress did not change or amend in any way the otherwise judicially-crafted definition of "custody" as it is understood under the federal courts' habeas corpus jurisdiction over prisoners when it amended the habeas statutes via AEDPA in 1996. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992)(where Congress re-enacts statutory language that courts have interpreted in a particular way, the inference is that Congress intended to adopt the established judicial interpretation); *Pierce v. Underwood*, 487 U.S. 552, 567-68 (1988)(accord); *General Motors Corp v. Devex Corp.*, 461 U.S. 648, 653-54 (1983)(accord). *See also Merrill Lynch Pierce Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982)(where Congress adopts a new law incorporating sections of prior law, it is presumed to know the interpretation given prior law); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)(where words are employed in a statute which had at the time a well-known meaning at common law, they are presumed to have been used in that same sense unless context compels contrary interpretation); *Agosto v. INS*, 436 U.S. 748, 754 (1978)(accord).

As enacted by Congress in 1996, AEDPA contains no definitional sections and in no other respect creates a statutory definition for the term "custody" as that term is employed in 28 U.S.C. §§2241, 2254 & 2255. While the state cites amended section 2244(d)(1) as creating a one-year statute of limitation for filing a federal writ by a prisoner in state custody, the statutory scheme in no other respect addresses the issue of precluding federal relief where a (federally time-barred) conviction is used to enhance the

punishment imposed on a later conviction, which is properly under timely collateral attack. Under these circumstances, it may hardly be said that Congress has spoken with sufficient clarity of an intention to overrule an undeviating line of cases from this Court over the past forty years that have defined and construed custody well beyond the bounds of mere physical imprisonment.

Viewed in terms of statutory construction, it is axiomatic that it will not be lightly inferred that Congress, in revising and consolidating the laws, intended to make a significant change in those laws, unless that intention is clearly expressed. *See Muniz v. Hoffman*, 422 U.S. 454, 472 (1975). Moreover, this Court has determined that, in the absence of contrary indications, it is logical to conclude that Congress intended statutory terms to have the same meaning in an amended statute. *United States v. Kozminski*, 487 U.S. 931, 945 (1988). Indeed, where, as here, Congress adopts a new law incorporating sections of prior law, it is presumed to know the interpretation given prior law. *See generally Merrill Lynch; Lorillard.*[2]

Here, there is no indication that Congress intended to alter or amend this Court's carefully crafted analysis of custody as developed in *Jones, Carafas, Hensley v. Municpal Court*, 411 U.S. 345 (1973); *Braden v. Thirtieth Judicial Circuit Court*, 410 U.S. 484 (1973), *Maleng, Garlotte* and *Spencer*. Indeed, AEDPA is silent with respect to any specific definition of "custody". Under the circumstances, it

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[2] Indeed, even if AEDPA is consulted merely to "inform" the Court's consideration of the judicially-crafted definition of "custody" (*cf. Felker v. Turpin*, 518 U.S. 651, 662 (1996)), there is nothing contained in the statute, other than the addition of a one-year statute of limitation, that even remotely addresses the question of "custody". Standing alone, that is hardly sufficient to meet the test of a clear expression of Congressional intention to abrogate the otherwise uniform judicial interpretation of custody as this Court has developed it over the past forty years. *See Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985).

may hardly be credibly argues that AEDPA has in any meaningful repect limited or changed this Court's long-standing interpretation.

D. The Lower Courts Properly Excused Exhaustion Based Upon Futility Where The Claim Languished In The State Courts For Seven Years

Notwithstanding the state's having declined to do so, its *amici* attempt to smuggle an issue of exhaustion and procedural default into the case at the eleventh hour. (St. *Amici* Br. 10-11).[3]

Contrary to *amici*'s contentions, the court of appeals (and the district court) properly invoked the futility exception to the preliminary requirement of exhaustion of state remedies on federal habeas review. 204 F.3d at 460-61 & n.8. The court of appeals noted that prior to filing his §2254 petition in federal court, Coss had promptly filed a petition for post-conviction relief on his 1986 conviction in the Pennsylvania state courts under Pennsylvania's Post Conviction Hearing Act. That petition had languished for seven (7) years without any action by the state courts. The court of appeals also noted that in light of Coss' release from custody on the 1986 conviction, he no longer had any effective remedies for state post-conviction relief to attack the earlier conviction – even in the context of an attack on the use of the 1986 conviction to enhance the 1990 sentence. *Id.* at 460 (*citing Commonwealth v. Ahlborn*, 548 Pa. 544,

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[3] As a preliminary matter, it is questionable whether this issue is even properly before the Court. In the first place, the issue was not raised in the lower courts nor as a Question Presented in the petition for certiorari. Nor, for that matter, was it addressed at all in petitioners' merits brief. *Yee v. City of Escondido*, 503 U.S. 519, 533-36 (1992)(failure to raise issue in lower courts or in certiorari petition deemed waiver). *See also Irvine v. California*, 347 U.S. 128, 129 (1954)("We disapprove the practice of smuggling additional questions into a case after we grant certiorari").

699 A.2d 718 (1997)). *Ahlborn* construed Pennsylvania's newly-enacted Post Conviction Relief Act as precluding *Tucker*-type post-conviction challenges to sentences based on unconstitutional prior convictions where the defendant is no longer in custody on the prior conviction. Accordingly, because there was no available state process which allowed Coss to challenge the use of the first conviction to enhance the second sentence, the court of appeals correctly excused exhaustion due to the absence of presently available state corrective process. *See Young v. Ragen*, 337 U.S. 235, 238-39 (1949)("The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts ... presupposes that some adequate state remedy exists. ... [P]risoners must be given some clearly defined method by which they may raise claims of denial of federal rights").

Under the circumstances, Coss was excused from exhaustion on the basis of futility in the absence of available state judicial remedies. Nor had he committed a procedural default in the course of his earlier futile attempts to litigate his claims in the state courts, only to be ignored for seven years.[4] This was clearly a case in which the state prisoner, rather than the remedy, was the one being exhausted. *See Marino v. Ragen*, 332 U.S. 561, 568 (1947)(Rutledge, J., concurring).

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[4] The court of appeals interpreted the Pennsylvania Supreme Court's decision in *Ahlborn* not as erecting a procedural bar but merely as a statement that there is no post-conviction remedy under Pennsylvania law for the type of claim raised by Coss. 204 F.3d at 460 n.8. Neither the state nor *amici* have cited any authority to the contrary. Plainly, this is precisely the kind of state law question in which, absent countervailing authority, this Court should defer to the greater familiarity of the *en banc* Third Circuit on questions of Pennsylvania law. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *see also id.* at 547 (O'Connor, J., dissenting); *DeBuono v. NYSA-ILA Medical and Clin. Serv.*, 520 U.S. 806, 812 (1997); *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997)(accord).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

EDWARD M. CHIKOFSKY
Counsel Of Record
301 East 87th Street
New York NY 10128
(212) 289-1062

DAVID M. PORTER
NACDL
1025 Conn. Ave. NW
Washington DC 20036
(202) 872-8600

Counsel for Amicus Curiae

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